BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATER OF GORDON A. ROSE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and RAYMOND C. HILL and GRISELDA HILL, Respondents.	PCHB No. 932 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an appeal of an order by the Department of Ecology approving respondent Hill's application (S3-20420) for the diversion of surface waters. The matter came on for hearing before the Pollution Control Hearings Board (William A. Harrison, hearing examiner, presiding alone), convened in Yakima on March 31, 1976. Respondent, Department of Ecology, elected a formal hearing.

Appellant, Gordon A. Rose, appeared by and through his attorneys Mr. Roger W. Boardman of Goldendale and Mr. William Almon of Yakima.

Respondent, Department of Ecology, appeared by and through its Assista Attorney General, Mr. Joseph J. McGoran. Pespondents Raymond C. Hill and Griselda Hill appeared by and through their attorney, Mr. Don Miles of Olympia.

Having read the transcript, having examined the exhibits, and having reviewed the proposed Findings of Fact, Conclusions of Law and Order of the hearing examiner, and having considered exceptions from appellant and respondents' replies thereto and having denied said exceptions, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I

At all times relevant to this appeal the appellant, Mr. Rose, held a right to withdraw waters of Spring Creek (Certificate No. 3544C), which right was formerly held by his predecessors in title Arthur L. Morris, et ux and J. C. and C. L. Stiles, et al.

II

The following chronology of events is hereby found as fact. References are to admitted exhibits:

1. Hill application - June 26, 1972 (S3-20420)(R-3).
2. Rose protest of Hill application - March 19, 1973 (R-4).
3. Rose application - April 5, 1973 (S3-21098) (R-6).
4. Department of Ecology "Field Investigation" - September 18, 1973
5. Orders disapproving Hill and Rose - January 28, 1974 (R-7, R-8).
6. Hill appeals disapproval (PCHB No. 529) - February 25, 1974.
7. Rose does not appeal his denial and right of appeal lapses.

8. Negotiation occurs between Department of Ecology and Hill in PCHB No. 529. No PCHB proceedings. Rose not notified of negotiations. Department of Ecology request Department of Game to supply "low-flow" limitation.

9. Department of Game field investigations - January (R-14) and September (R-15) 1975.

10. Department of Ecology grants Hill application of June 26, 1972 - October 2, 1975 (R-9).

11. Department of Ecology notifies Rose of order approving Hill - October 10, 1975 (A-1).

12. Rose appeals approval of Hill application (this appeal, PCHB No. 932) - October 22, 1975.

13. Department of Ecology conditions Hill approval upon low flow of 7.0 cubic feet per second - October 31, 1975 (R-10).

14. Hill approval with low-flow condition is adopted by Pollution Control Hearings Board as a consent order in PCHB No. 529 - November 3, 1975 (of this official notice is taken.)

III

I find as fact the following summary of post-1949 applications for withdrawal of water from Spring Creek:

	Name	Quantity	Date	Denied
1.	Stiles	1.5 cfs	June 7, 1950	November 10, 1950
2.	Hill	.65 cfs	October 2, 1950	February 8, 1951
3.	Dunn	2.0 cfs	May 18, 1964	Granted non-contributing tributary
4.	Hill	2.0 cfs	June 26, 1972	January 28, 1974
5.	Rose	1.5 cfs	April 5, 1973	January 28, 1974
6.	Rose	?	March, 1976	Pending

IV

Between 1964 and 1968, the United States Geological Survey (USGS) maintained a gauge for the measurement of stream flow in Spring Creek.

Spring Creek is a tributary of the Little Klickitat River, and said Spring Creek is the subject of this appeal.

The USGS gauge was located above all points of diversion, and readings from that gauge, as they appear at R-12 are hereby found as fact. The mean stream flow is recorded in cubic feet per second (cfs) at 15.1 cfs, 14.0 cfs, 14.0 cfs, and 12.4 cfs, respectively, for water years ending in 1965, 1966, 1967 and 1968 respectively.

In January, 1975, Mr. John W. Hunter of the Fisheries Management Division of the Washington Department of Game (an aquatic biologist II) visited the former USGS gauge site. Mr. Hunter is responsible for establishing low flow limitations in Washington streams for the purpose of protecting fish and wildlife. Mr. Hunter took cross section measurements and calculated stream flow to be 17.92 cfs. At the downstream point described in the conditions within the order now appealed (see R-10 he measured stream flow at 22.79 cfs on the same day. Also on the same day he measured flow in the east fork of Spring Creek to be 2.88 cfs. By combining headwater inflows of 17.92 cfs and 2.88 cfs, he calculated total inflow at 20.80 cfs which is approximately 2.0 cfs less than the measured outflow of 22.79 cfs (R-14). Mr. Hunter concluded, from this excessive outflow, that an influx of water must be entering Spring Creek from an underground spring. There being no substantial evidence to the contrary, it is a fact that a spring exists as described by Mr. Hunter.

On October 14, 1975, based largely on Mr. Hunter's conclusions, the Department of Game requested the Department of Ecology (DOE) to set a low flow limitation of 7.0 cfs in Spring Creek (A-1). Assuming a

conservative influx of 1.5 cfs from the underground spring, and no inflow from the east fork, it is noted that a flow of 13.0 cfs at the USGS gauge site would provide 14.5 cfs total inflow. All lawful consumptive diversion from Spring Creek totals 5.89 cfs. The difference is 8.61 cfs, or enough for an additional 1.5 cfs diversion with 7.11 cfs remaining for satisfaction of the low-flow requirement requested by the Department of Game. In addition, the exact point of influx from the underground spring is of no consequence since the low-flow limitation is to be measured at the downstream point used by Mr. Hunter in discovering the spring. There being no substantial evidence to the contrary, a minimum flow of 7.0 cfs, measured at the downstream point described in the appealed order (see R-10), is sufficient to protect fish and wildlife associated with Spring Creek.

V

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

I

In this case, DOE has used investigative data assembled by other agencies of government (one federal, one state) in lieu of conducting its own investigation. RCW 90.03.290 declares that:

> In determining whether or not a permit shall issue upon any application, it shall be the duty of the supervisor [Department of Ecology] to investigate all facts relevant and material to the application.

Such statutory language does not prohibit DOE from adopting the relevant, recent and reliable investigations of others as the basis

for approval or disapproval of an application to appropriate water. To do so would make the Department a master without servants and a governmental agency consigned to waste public funds by conducting investigations only recently completed by others. No investigation which would comply with the requirements of RCW 90.03.290 if conducted by DOE is invalid solely for the reason that it was conducted by another and adopted by the Department.

II

RCW 90.03.290 requires four determinations by DOE before issuance of a water use permit: (1) What water, if any, is available; (2) To what beneficial uses the water is to be applied; (3) Will the appropriation impair existing rights; and (4) Will the appropriation detrimentally effect the public welfare. Stempel v. Department of Water Resources, 82 Wn.2d 109 (1973). The applicant, Mr. Hill, seeks to appropriate water for irrigation which use is defined as beneficial at RCW 90.54.020(1). Appellant contends, however, that Mr. Hill's appropriation, if allowed, would seek water where none is available and/c impair the existing water rights of appellant and others. Appellant has offered no substantial evidence in support of his contention. As noted above, Finding of Fact IV, 13.0 cfs is required at the point measured by USGS in order to accommodate both Mr. Hill's application and the 7.0 cfs low flow limitation requested by the Department of Game. The USGS gage readings (R-12) reflect flows both above and below 13.0 cfs. Mr. Hunter calculated flows of 17.92 cfs and 14.95 cfs in January and September, 1975, respectively (R-14, R-15). So long as Mr. Hill is required by his permit to cease withdrawal when post-diversion

stream flow falls below 7.0 cfs (R-10) water is available, and Mr. Hill's withdrawal will not impair the water rights of others. In addition, the 7.0 cfs permit-condition is sufficient for the protection of fish, wildlife and scenic values as is required by RCW 90.54.020(3)(a) and as may be required by the "public welfare" clause of RCW 90.03.290. While no reason exists to suppose that the 7.0 cfs permit-condition would be violated, the usual legal remedies exist in that event, including criminal prosecution.

III

Appellant points out that if Mr. Hill's application is approved it will become the first to be approved on Spring Creek in some 26 years. Others making application, including one Stiles who is a predecessor in title to Mr. Rose, have had their applications disapproved. From this, appellant contends that DOE must be estopped to approve Mr. Hill's application, and should, instead, approve appellant's predecessor's application. These contentions are without merit.

The parties have not urged upon this Hearings Board, nor will this Hearings Board commence research upon, the appeal proceedings, if any, available to Mr. Stiles upon disapproval of his application on November 10, 1950 (R-5). Whatever the situation then, this Hearings Board is without jurisdiction to now review the propriety of that disapproval or revive that application at this date. Since there is no jurisdiction to inquire of the propriety of that disapproval, it cannot be concluded whether it was right or wrong.

Assuming, however, that it was wrong, there is no authority for this Hearings Board to reverse that disapproval and vest appellant with

the water right of his predecessor.

This Hearings Board will estop the speaking of truth by one who has perpetuated falsehood where so estopping the truth will prevent unjust benefit to the perpetrator of falsehood or unjust detriment to one who relied on the falsehood. But lacking review of the Stiles application there is no basis upon which to say that DOE's predecessor perpetrated falsehood. Likewise, the estoppel of approval for Mr. Hill would neither prevent an unjust benefit to DOE, nor, owing to our powerlessness to revive the Stiles application, would it prevent an unjust detriment to Mr. Rose. It is therefore concluded that appellant has invoked the doctrine of estoppel against Mr. Hill, who was not a party to the Stiles disapproval, yet cannot invoke it against DOE nor in favor of himself. The Hearings Board will not estop DOE from truthfully ordering approval of Mr. Hill's application under these circumstances.

IV

Appellant asserts that he was not informed of private settlement negotiations between the parties, Mr. Hill and the DOE, in PCHB No. 529. PCHB No. 529 was commenced by Mr. Hill in response to the initial order of disapproval issued by DOE (R-7). From this appellant contends that he was denied notice and opportunity to be heard as required by his status as a protester (see R-4), and due process of law as guaranteed in the Washington and United States Constitutions.

The letter of protest filed by appellant did not render him a party to PCHB No. 529, and therefore did not entitle appellant to any notice of proceedings therein. Third persons may become parties to appeals before this Hearings Board by a written application to the Hearings

Board under WAC 371-08-095 (Cross-Appeals) or WAC 371-08-145 (Pre-trial Rules of Superior Court). Letters filed with DOE are not sufficient for this purpose.

Appellant cites Gau v. Washington Utilities and Transportaiton Commission, 13 Wash. App. 219 (Div. III, 1975) for the proposition that "protesters" are parties to appeals of the proposals which they protest. That case is inapposite for two reasons.

First, the characterization of those who "oppose applications or petitions" as "parties" arose out of a procedural rule of the WUTC, namely, WAC 480-08-030. This Hearings Board has no equivalent rule.

Second, this Hearings Board is an independent agency of state government, and is not a division of the Department of Ecology, RCW 43.21B.010. The WUTC, by contrast, is a single agency. Thus, the testimony made to the WUTC in Gau was directed to the hearings agency. A letter of protest written to DOE is not directed to the hearings agency, which is this Hearings Board.

Because appellant had full opportunity to bring his appeal before this Hearings Board after the Department's approval of Mr. Hill's application, it is only supposed that appellant claims breach of due process in being left out of PCHB No. 529 which precipitated the approval. Appellant was well aware of the submission of Mr. Hill's subject application before PCHB No. 529 was commenced by Mr. Hill. This is demonstrated by appellant's letter of protest to the Department which antedates commencement of PCHB No. 529 by some eleven months (R-4 and the file in PCHB No. 529 of which official notice is taken). As has been said, appellant could have joined in PCHB No. 529 although

only by written application to this Hearings Board. Notwithstanding that he did not, he was promptly informed of the Department's approval (A-1) following which this full scale appeal and hearing on the merits took place. Appellant has not been denied any right of notice or hearing.

Appellant further contends that the negotiations between Mr. Hill and the Department in PCHB No. 529 were illegal in that they took place without supervision by this Hearings Board. This claim is without merit. No rule of this Hearings Board requires a Hearings Board officer to be present at settlement negotiations of the parties. Secret negotiations do not violate ITT Rayonier v. Hill, 78 Wn.2d 700 (1970) vesting all hearing authority in this Hearings Board. Settlement negotiations are strongly encouraged by this Hearings Board, and do not constitute an usurpation of its jurisdiction since any consent order arising therefrom must be adopted by this Hearings Board under authority vested by WAC 371-08-145 and RCW 34.04.090(3) referring to consent orders.

V

Lastly, appellant contends that Mr. Hill's subject application terminated upon its disapproval by DOE on January 28, 1974 (R-7). It follows that the Department would be unable to approve the application once this termination had occurred.

Appellant cites State ex rel. Hearty v. Mullin, 198 Wash. 99 (1939) in support of his contention. In that case, Hearty applied for employment with the City of Seattle. As required by civil service law, he completed practical examinations and listed his experience in work of the kind applied for. The civil service authority then graded Hearty (anonymously) according 60 percent weight to the practical examination and 20 percent

weight to experience. After learning Hearty's identity, the civil service authority then purported to regrade his performance according 40 percent to the practical examination and 40 percent to experience. This had the effect of lowering Hearty's grade. The Supreme Court ruled that this reconsideration, after Hearty's identity became known, was contrary to the letter and spirit of the civil service law.

In this case, DOE disapproved Mr. Hill's application. In timely fashion, Mr. Hill then invoked the review jurisdiction of this Hearings Board (PCHB No. 529). Although the order concluding that appeal originated as a stipulation between the parties, its sole legal significance lies in the fact that said order was adopted as an order of this Hearings Board.

Whatever the power of a civil service agency or the Department may be as to unilatateral modification of prior orders, it is concluded that full authority exists for the Department to stipulate to any lawful order of this Hearings Board including one which reverses a prior Department order. Because of this, Mr. Hill's application had not "terminated" but was within the review jurisdiction of this Hearings Board when, on November 3, 1975, this Hearings Board ordered and approved the Department's stipulated approval of Mr. Hill's application from which this appeal and contested hearing on the merits arose.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

ORDER

For the reasons above stated, the appealed Department of Ecology Orders, Docket Nos. DE 74-31, as amended, (R-9) and DE 74-31A (R-10), which accord a right of water appropriation conditioned upon a low-flow limitation, are each hereby affirmed.

DATED THIS 1th day of September, 1976.

POLLUTION CONTROL HEARINGS BOARD

CHRIS SMITH

ART BROWN

W. A. GISSBERG